Bank. The record is however silent on whether Yoong Fook stood on the same footing as Siow Ting Yong and Fu Kok Siew.

It is reasonably clear that the land which is the subject matter of the second charge, being situated in Bentong in the State of Pahang, a town not of very considerable importance, is not sufficient to realise the full extent of the overdraft facilities granted under the charge and that it was for this reason that the Bank could not rely on the foreclosure summons to recover what it had lent to Valor and had to take action on the guarantees.

The defence that was delivered for Chai Yen literally "threw the book" at the Bank. She claimed that she had signed the guarantee in blank and denied any receipt of any advance of the $970,000 which consequently was not mentioned in it, and she asserted that Valor was made responsible for the money due to the Bank from the third and fourth defendants. She also charged the Bank with fraud by acting on the charges and the guarantee when it was agreed between them that the documents were not to be acted on. She made many other allegations. The truth of her allegations will of course have to be established at the trial of the action and tested against the counter allegations made by Gan Kah Chai, an assistant manager of the Bank on July 1, 1976 of "kite flying" which, as we understand it, is a commercial slang for an operation of a somewhat dubious character for raising money on credit. But this observation should be made: the chargor was said to have been given a copy of the guarantee and one would have expected her to deny this allegation or if she could not, to produce the copy given to her and show whether it was executed also in blank.

We mention this civil action partly because it was referred to in the chargor's affidavit filed to oppose the foreclosure summons and also to note and indicate that the accusation that the guarantee was signed in blank, had been made earlier and at the least, for what it is worth, bore the mark of consistency.

But though mentioned, the question of the guarantee was not taken up at the hearing of the foreclosure action and no application was made to test the authenticity of the document. The application before us was therefore one for the introduction of fresh evidence.

The principles to be applied for the reception of fresh evidence have been stated by Denning L.J. (as he then was) in *Ladd* v. *Marshall*[1] at page 1491:

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly that evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible."

These principles as so stated have been consistently followed and have now received the approval of the House of Lords in *Skone* v. *Skone & Anor.*[2] See also *Leng Lan (f)* v. *S.M. Yesudian*[3] and *Shaik Sahied bin Abdullah Bajarie* v. *A.R.A. Mootoo Carpen Chitty*[4] at page 21.

Enough, we think, has been said to show that the applicant could not have satisfied the first requirement. Failure to satisfy this first requirement is sufficient for the dismissal of the application: *Lau Foo Sun* v. *Government of Malaysia.*[5]

As for the second, it seemed to us at the hearing of the application and still does to us now, and beyond argument that the subject matter of the civil suit was the guarantee and that of the foreclosure summons was the two charges. It follows therefore that while the allegations regarding the guarantee might be material to the civil suit, it had absolutely no relevance to the foreclosure action. That was the view of the Bank whose counsel, in our view, very correctly, indicated his entire willingness to make available the document in question at the hearing and for the purpose of the civil action but who said that he could see no connection whatsoever with the order of sale of the lands secured by the charges. In the matter of the charges, what was relevant was the ground on which the chargor challenged the granting of the order of sale and that strictly was the matter before this court on an appeal from the High Court.

In view of the High Court action on the guarantee, we must clearly refrain from commenting on its authenticity or credibility but in all the circumstances of the case, there was no merit in the application and we refused it with costs.

Application refused.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

EAST UNION (MALAYA) SDN. BHD. v. GOVERNMENT OF STATE OF JOHORE & GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P.) April 28 & 29, 1980]

[Kuala Lumpur — Federal Court Civil Application No. 2 of 1980]

Constitutional Law — Application for leave to ask for declaration that Federal Law is ultra vires and void — Contention that Parliament has no power to enact law — Forfeiture of land for non-payment of rent — National Land Code, ss. 100 & 134 — Federal Constitution, Art. 4(4).

Land Law — Forfeiture of land for non-payment of rent — Whether s. 100 of National Land Code ultra vires and void — Federal Constitution Art. 4(4) — National Land Code, ss. 100 & 134.

In this case the applicant company did not pay quit rent for the rubber estate, of which it was the owner and the estate had been forfeited to the Johore Government. Its appeal to have the forfeiture annulled was turned down and it therefore applied for leave of a Judge of the Federal Court to ask for a declaration that section 100 of the National Land Code is void, as it is *ultra vires* Articles 76(4) of the Federal Constitution.

Held: (1) the contention in this case was that Parliament had no power to enact the impugned law and therefore as this was not an inter-governmental dispute leave is necessary before proceedings can be commenced;

(2) leave should be granted to give the applicant company the opportunity of having this matter ventilated in court.

Case referred to:-

(1) *Syarikat Banita Sdn. Bhd.* v. *Government of State of Sabah* [1977] 2 M.L.J. 217.

FEDERAL COURT.

James Puthuchery (*Upale Masacorale* with him) for the applicant.

Fong Seng Yee (Senior Federal Counsel) for the Government of Malaysia.

Datuk Nik Mohamed bin Nik Yahya (Legal Adviser, Johore) for the Government of Johore.

Suffian L.P.: The applicant company, owner of a rubber estate (East Union Estate) of 7,477 acres in Johore, did not pay the quit rent due for 1973 ($115,634.70) and, after notice, on March 13, 1975, was understandably mortified to see the estate forfeited by the Johore Government acting under Part Six, Chapter I of the National Land Code, which includes section 100. It appealed twice to the State Government to have the forfeiture annulled, but each time the appeal was turned down. So it now wants to come to this court (which has exclusive original jurisdiction over a matter of this kind, see Article 128(1)(a) of the Constitution) to ask for a declaration that section 100 is void, being, it is said, *ultra vires* Article 76(4). To do this, it seeks the leave of a judge of this court. Hence this application.

Over the objection of the Malaysian Government and the Johore Government, I granted leave and now give my reasons.

The first issue is whether or not leave is necessary.

Mr. Fong for the Malaysian Government contended that no leave was necessary and that therefore this application was superfluous, and he cited in support my decision in *Syarikat Banita Sdn. Bhd.* v. *Government of State of Sabah.*[1]

I do not think that that case applies. There the contention was that the impugned law was contrary to the Constitution. That is not the contention here, the contention here being that Parliament exceeded the power given to it by Article 76(4) when it enacted the section. In other words, the contention is that Parliament did not have power to enact it.

The scheme of the Constitution is that land is a state subject concerning which only state legislatures have power to legislate. That is so provided by Clause (2) of Article 74 and item 2 in the state list in the 9th Schedule. But Clause (4) of Article 76 makes an exception by providing that "for the purpose only of ensuring uniformity of law and policy," Parliament "may make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land".

The applicant in its affidavit in support appears to concede that Parliament may in certain circumstances legislate as regards land, though it is a state subject; but contends that the impugned section "is in excess of the limitation imposed by the legislative competence of Parliament by Article 76(4) of the Constitution of Malaysia". Secondly, it says that even prior to the Code there already existed uniform laws in every State on the Peninsula setting out the steps to be taken by each State in the event of non-payment of rent, and so the impugned section was not enacted only for the purpose of ensuring uniformity of law and policy in relation to recovery of rent.

As the contention is that the section is void because Parliament does not have power to enact it, and this is not an inter-governmental dispute, leave is necessary before proceedings can be commenced — see Clause (4) of Article 4 which reads:

"'(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3)' — i.e. that the legislature concerned has no power to enact it — '(not being proceedings falling within paragraph (a) or (b) of the Clause)' — i.e. not being proceedings between governments — 'shall not be commenced without the leave of a judge of the Federal Court;..."

The second issue is, should leave be granted?

Datuk Nik Mohamed, for the Johore Government, opposed the application on the ground that the company had three remedies under section 134(1) of the Code, that it had only pursued one of them (by applying to have the forfeiture annulled), that the second and last application was turned down on July 29, 1975, and that only on April 15, 1980 — i.e. nearly three years later — did it show a desire to ask this court for this declaration, which is obviously an indirect way of trying to have the forfeiture annulled. I do not think that this objection can be upheld. If the impugned section is void, then the forfeiture is also void, section 134(1) notwithstanding.

For the above reasons, I gave leave as prayed, because I do not think that it is fair to deny the company the opportunity of having this matter ventilated in court.

Leave granted.

Solicitors: *Skrine & Co.*

J.L.J. SELVAM & ANOR. v. S.J. MEHTA & ANOR.

[F.C. (Suffian L.P.) April 28 & May 8, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 46 of 1980]

Practice and Procedure — Appeal — Notice of appeal filed within time — Appeal record not filed within time — Application to extend time — Delay of trial judge in supplying notes of evidence and grounds of decision — Discretion to allow extension time — Federal Court Civil Appeal (Transitional Rules), 1963, rr. 13 & 73.

In this case the appellant had filed the notice of appeal in time but did not file the appeal record in time. The reason for the delay was because the learned judge did not supply the notes of evidence and the grounds of decision in time so as to enable the appellants to file the appeal record. The appellants applied for extension of time to file the record of appeal.

Held: the court has a discretion to grant an extension of time under rule 73 of the Federal Court Civil Appeals (Transitional Rules), 1963. Delay by the learned trial judge in supplying the necessary papers is a good ground for allowing the application.

Cases referred to:-

(1) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.

(2) *Chong Kueng Ying & Ors.* v. *Louis Lavagna* [1972] 1 M.L.J. 180.

(3) *Gan Hay Chong* v. *Siow Kian Yuh & Anor.* [1975] 2 M.L.J. 129.